OBJECTIONS TO JURISDICTION

The Respondents file this brief in opposition to the Petition for Writ of Certiorari initiated by Petitioner on the grounds that no basis for review pursuant to Rule 19 of this Court has been shown. More particularly, no substantial federal question has been raised and the decision of the Florida Supreme Court is entirely consistent with applicable state law.

STATEMENT OF THE CASE

Respondents are unable to accept Petitioner's statement of the case. Although substantially accurate, Respondents would respectfully restate the case as follows:

This cause arose from an original proceeding in mandamus before the Florida Supreme Court. The issue involved was the legality of the position taken by the Department of Revenue of the State of Florida that "consideration" for purposes of determining documentary stamp tax liability pursuant to Section 201.02, F.S., may include the value of a mortgage which the buyer takes "subject to" rather than expressly assuming.

On May 29, 1968, Petitioner sold certain real property located in Dade County, Florida, to Clinton H. Churchill and Clinton D. Churchill of Buffalo, New York.

The Petitioner agreed with said grantees that Petitioner would pay any and all recording fees and stamp taxes involved in the transaction.

The property was subject to a mortgage payable to the Life Insurance Company of Virginia, but the mortgage was not assumed by the grantees. The contract between the parties called for cash payment of $650,000 over and above the value of the outstanding mortgages on the date of closing. This $650,000 is claimed by Petitioner to be the total consideration involved. Tax was paid on the $650,000 amount.

The State claimed that a balance of $1,481.40 in regular documentary stamp taxes remained owing on the deed in question after that deed was recorded. The State contended that since the aforesaid mortgage was outstanding and figured in the negotiations of the parties, it constituted consideration.

In response to the assessment by the State, the plaintiff paid the tax under protest and made requisition for refund, which requisition was formally denied by the Department of Revenue.

The Respondents traced the legislative history of Section 201.02, F.S., in their presentation to the Florida Supreme Court. The Florida statute evolved from Chapter 15787, Acts of 1931, and was taken largely from 26 U.S.C., §4361, which was

the Federal Documentary Stamp Tax Act.

However, there is a significant difference between the Florida act and the Federal one. The Federal act expressly excluded the value of mortgages when it placed the tax on the consideration or value of the property conveyed, "exclusive of the value of any lien or encumbrance remaining thereon at the time of sale." The Florida law, although otherwise nearly identical, did not contain any exclusion of liens or other encumbrances.

The Respondents argued that the contract of the parties which called for a purchase price of $650,000, "over and above the principal balances as of the date of closing on these certain existing first mortgages encumbering said property," showed the intent of the parties to include the mortgage values as "consideration".

The Supreme Court of Florida agreed with the position of the Respondents. The case was argued and briefed on purely state legal grounds and no "Federal Question" was ever raised until Petitioner's Petition for Rehearing in the Florida Supreme Court.

ISSUES INVOLVED

ISSUE I

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

ISSUE II

WHETHER AN ALLEGED FEDERAL QUESTION WHICH WAS NOT RAISED UNTIL PETITION FOR REHEARING IN THE STATE SUPREME COURT IS A PROPER SUBJECT FOR REVIEW BY THIS COURT.

ARGUMENT

ISSUE I

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED.

The guidelines of this Court governing writs of certiorari are well established and U.S. Supreme Ct. Rule 19, 28 U.S.C.A., states in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Respondents respectfully submit that no federal question of substance was involved in the decision of the Florida Supreme Court sought to be reviewed here.

The Supreme Court of Florida was called upon to determine what constituted "consideration" within the purview of Section 201.02, F.S. This is clear from the court's opinion (Appended to Petitioner's brief as Appendix A, App. 3) which stated:

> "The question before us is whether 'consideration' for the purpose of measuring the amount of documentary tax due under Florida Statutes §201.02 includes the value of an outstanding mortgage on the property, which mortgage is not expressly assumed by the buyer, although the property is sold subject to the mortgage. We agree with the contention of respondents herein that the clear purpose of Florida Statutes §201.02 is to place a documentary stamp tax on the total consideration involved in a transfer of real property and that this amount includes any outstanding mortgages."

The construction of the Florida documentary stamp tax statute was purely a question of state law. As this Court said in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945):

> "Third. This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. Murdock v. Memphis, 20 Wall. (US) 590, 636,

22 L ed 429, 444; Berea College v. Kentucky, 211 US 45, 53, 53 L ed 81, 85, 29 S Ct 33; Enterprise Irrig. Dist. v. Farmers Mut. Canal Co. 243 US 157, 164, 61 L ed 644, 648, 37 S Ct 318; Fox Film Corp. v. Muller, 296 US 207, 80 L ed 158, 56 S Ct 183. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Although Petitioner makes mention of the fact that Florida Attorney Generals' Opinions (Appended to Petitioner's brief as Appendices E, App. 15-16 and F, App. 17-20) were in effect for 30 years, it fails to mention that Attorney General's Opinion 061-77 (Appendix G, App. 21-27) was rendered seven years before the transaction involved here. Petitioner was clearly aware of the changes in the application of Section 201.02, F.S.

Respondents contended in the Court below that there were sound factual and legal reasons to find that the Petitioner herein had included the value of the outstanding mortgages as "consideration".

This was partly based on the fact that the agreement between the parties clearly contemplated that the buyer would make all mortgage payments after "closing" whether legally bound to or not.

As the Florida Supreme Court said (Appendix A, App. 4):

> "In the instant case, the concept of 'consideration' as used in Florida Statutes §201.02 is clearly satisfied. The Sale and Purchase Agreement of the parties dated April 26, 1968, contemplates a transfer of the burden of making the mortgage payments to the grantee as of the date of closing and a corresponding benefit derived by the grantor who agreed to make mortgage payments only up until the time of closing, including June 1, 1968. The Stipulation of the parties filed in this Court states that the grantee of the property had, in fact, made all mortgage payments since the closing date. This arrangement constitutes a part of the consideration for the transfer of the property. Any other view of the situation is unrealistic." (Emphasis supplied)

No matter how skillfully Petitioner endeavors to create a federal question in the case at bar, the fact remains that none exists. As this Court stated in

Wilson v. North Carolina, 169 U.S. 586, 593-595 (1898):

> "Upon this subject it was said, in the case of Allen v. Georgia, 166 U.S. 138, 140, as follows: 'To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State had acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.'
>
> * * * *
>
> "Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so

> unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.
>
> "In Hamblin v. Western Land Company, 147 U. S. 531, it was stated that 'a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. Milligar v. Hartupee, 6 Wall. 258; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 87. In the latter case it was said that "the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."'"

The Wilson case has not been overruled and the reasoning of that case is clearly applicable in the case sub judice.

ISSUE II

WHETHER AN ALLEGED FEDERAL QUESTION WHICH WAS NOT RAISED UNTIL PETITION FOR REHEARING IN THE STATE SUPREME COURT IS A PROPER SUBJECT FOR REVIEW BY THIS COURT.

Respondents respectfully submit that the "Federal Questions" alleged by Petitioner were completely overlooked until its Petition for Rehearing in the Florida Supreme Court. The questions of due process and equal protection were never briefed or raised in oral argument. Petitioner all but admits this when it states that the equal protection and due process arguments were "inherently involved" in its original application for mandamus (see Page 8 of Petitioner's Brief).

Respondents submit that Petitioner raised no federal question prior to rehearing in the Florida Supreme Court and is therefore precluded from review by this Court. As this Court said in Hanson v. Denckla, 357 U.S. 235, 243-245 (1958):

> ". . . We need not determine whether Florida was bound to give full faith and credit to the decree of the Delaware Chancellor since the question was not seasonably presented to the Florida court. Radio Station WOW v.

Johnson, 326 U.S. 120, 128, 89 L Ed 2092, 2099, 65 S.Ct. 1475."

Further authority is found in the case of Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945), where this Court said:

> ". . . Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition (citations omitted)."

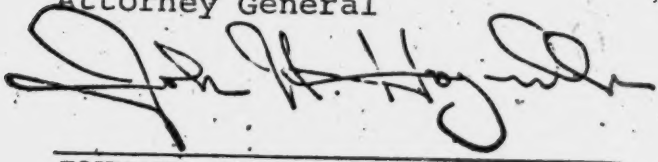
Thus, Respondents content that even if a Federal question is in fact raised in this instance, it was not raised in a proper manner in the court below.

CONCLUSION

No adequate grounds exist to invoke the jurisdiction of this Court since no Federal question exists. This case was resolved by the Florida Supreme Court purely within the framework of existing state law and the Federal questions sought to be reviewed here were never raised until Petition for Rehearing.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General



JOHN N. HOGENMULLER
Assistant Attorney General

WINIFRED L. WENTWORTH
Assistant Attorney General

Counsel for Respondents

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32304

PROOF OF SERVICE

This is to certify that I, Winifred L. Wentworth, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States, on the 18th day of August, 1971, serve a copy of the foregoing Response to Petition for Writ of Certiorari on the Petitioner by mailing a true and correct copy in a duly addressed envelope with first-class postage affixed, to its counsel, Ralph H. Bearden, Jr., Attorney, P.A., 648 S.W. 12 Avenue, Miami, Florida 33130.

WINIFRED L. WENTWORTH
Assistant Attorney General